Supreme Court, U.S
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No. 04-228

IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,
Petitioner,

v.

MELANIE BENJAMIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER FIRST NATIONAL BANK OF MILACA

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INTRODUCTION

Petitioner First National Bank of Milaca submits this reply to Respondents' Brief in Opposition. Respondents cannot effectively distinguish this Court's decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), where, in a context analogous to the case confronting Petitioners here, the parties involved had a sufficiently concrete stake to adjudicate a reservation boundary dispute. The briefs *amicus curiae* of the States of Minnesota, South Dakota and North Dakota, and from a township, city and landowners within the disputed area, further demonstrate the immediacy of the boundary dispute and the appropriateness of resolving the issue now.

ARGUMENT

I. THE BAND CONCEDES ITS INTENT TO EXERCISE JURISDICTION TO THE FULLEST EXTENT PERMITTED BY FEDERAL LAW.

Respondents assert that in the 20 plus years that various Band statutes have been in existence, there has not been any effort to regulate activities of the Bank. However, the letters the Band sent to businesses within the disputed area did not purport to limit the demand to register and pay a licensing fee solely to those doing business with Band members. The jurisdictional assertion was tied to doing business "on lands under the jurisdiction of the band." (Pet. App. at 60a.) Even the Band's responsible officer conceded that the letters reached to all businesses within the disputed area. (Pet. at 10.) Likewise, the Band's ordinances were conceded to apply on their face to this Bank. Indeed, Respondents do not address the fact that the Band's environmental statutes are expressly premised on the existence of the former 1855 reservation. (8th Cir. App. 210, 215.)

Band Chief Executive Melanie Benjamin conceded the Band intends to regulate as far as federal law allows. In their brief, Respondents likewise concede the Band asserts the

right to regulate within the former 1855 reservation if that area is "Indian country," "depending on who [sic] . . . is being regulated or the purpose of the regulation. . . ." Brief in Opposition at 2. Under *Montana v. United States*, 450 U.S. 544, 561 (1981), the power to regulate non-members extends to "what is necessary to protect tribal self-government," but only within the territory of a reservation. While *Nevada v. Hicks*, 533 U.S. 353 (2001), may presently limit tribal authority over non-members, as the recent decision in *United States v. Lara*, 124 S.Ct. 1628 (2004), indicates, Congress may be able to extend tribal power over non-members. Respondents do not dispute there is an active "*Hicks* fix" effort underway by various tribes to convince Congress to override *Hicks* under the guise of extending tribal self-government. Thus, the Bank has a bona fide concern over being subject to regulation by an governmental entity from which the Bank is wholly excluded.

II. THE PRECEDENT OF THE COURT AND OTHER APPELLATE COURTS DEMONSTRATES A NEED TO CLARIFY THE LAW OF STANDING IN THIS AREA.

Respondents attempt to distinguish two key boundary decisions of this Court by claiming that in *Rosebud* and *South Dakota v. Yankton Sioux Tribe*, 422 U.S. 329 (1988), there were explicit disputes over the state's power to regulate within the claimed reservation boundaries. Yet, in each case, the central issue was the existence of the reservation boundary, devoid of any ongoing enforcement proceeding. Similarly, in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), there had not been any enforcement action; the Tribe did not dispute the need to resolve the boundary controversy.[1]

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[1] Likewise, there is no functional way to distinguish the interests of the Bank and County from the potential economic harm held sufficient to

Respondents argue that two Eighth Circuit cases also support the proposition that enforcement of a tribal ordinance is required before Article III standing exists. Respondents characterize *Baker Elec. Co. v. Chaska*, 28 F.3d 1466 (8th Cir. 1994), as conferring standing on one utility allegedly competitively disadvantaged by the tribal utility code. But evidence of actual economic harm is nowhere to be found in that decision. Similarly, in *Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community*, 781 F. Supp. 612 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993), it was the possibility of tribal enforcement of a tribal ordinance that created a justiceable controversy, while the tribe's effort to avoid judicial resolution by eschewing immediate enforcement was rejected.

Respondents also cannot effectively distinguish this case from *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993), in which the Eighth Circuit held that because the landowners had interests in property located within the area where the Band was asserting hunting and fishing rights, and because those property interests could be adversely affected by the Band's actions, the landowners had a legally protectable interest. *Id.* at 998. The landowners were allowed to intervene as of right, which could only be allowed if they had standing, *see Mausolf v. Babbitt*, 85 F.3d 1295, 1299-1301 (8th Cir. 1996), simply because the Band claimed an as yet unexercised right to hunt on the landowners' properties. The rights the Band asserts here over the Bank are certainly more substantial than the unexercised usfructory right asserted in *Mille Lacs Band*, making the Bank's case for standing stronger.

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confer standing under this Court's general standing principles, as articulated *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). The regulatory apparatus the Band has enacted presents at least the same economic effects found sufficient to confer standing in *Gladstone*. *See* Pet. at 14.

Respondents' reliance on *Association of Property Owners/ Residents of Port Madison Area* [*APORPMA*] *v. Individual Council Members of the Suquamish Tribal Council*, Case No. C01-5317FDB (W.D. Wash. 2002), and *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless* [*Brown*], No. 85-C-1052 (E.D. Wis. 1990), is misplaced. In *APORPMA* the plaintiffs could not point to *any* section of tribal code which purported "to define the boundaries of the Reservation or to assert that plaintiffs' properties lie within them." (8th Cir. App. 376.) Moreover, the plaintiffs in *APORPMA* could not direct the court to any Band regulatory statute that appeared to be applicable to the plaintiffs. (8th Cir. App. 376.)

Unlike *APORPMA*, the Bank seeks declaratory relief to restore the certainty that has been lost due to appellees' *own* unequivocal assertion that the reservation boundaries created by the 1855 Treaty were not disestablished. And unlike the plaintiffs in *APORPMA*, the Bank has identified numerous Band regulations which apply on their face to the Bank.

The *Brown* decision is similarly unpersuasive. In that case the court determined there was no justiciable controversy because the only allegation plaintiffs presented to the court was that the Oneida Tribe of Wisconsin had entered into a "Memorandum of Agreement" with the Wisconsin DNR and the United States EPA to develop environmental regulations for joint implementation within the Oneida reservation. (8th Cir. App. 54.) Because the environmental regulations had not yet been promulgated, the case was simply not ripe for review. (8th Cir. App. 55.) Here, however, the Band has gone far further and enacted—and expressed the intent to enforce to the extent allowed by federal law—numerous statutes that facially apply to the Bank and its customers. Indeed, as *amicus* State of Minnesota makes clear, the Band has convinced EPA to give it treatment as state status within the former 1855 reservation. This case, therefore, falls squarely within *Baker Electric* and *Northern States Power*.

III. RESPONDENTS' ANALYSIS OF STANDING DEMONSTRATES THE NEED FOR A DECISION CLARIFYING THE CONTOURS OF STANDING IN A BOUNDARY DISPUTE.

The Bank demonstrated more than a theoretical concern in the boundary dispute. It does a substantial share of its business within the affected area and does business with Band members that currently subjects it to the Band's consumer protection statutes. It presented more than sufficient impact for the dispute to have standing.

To follow the Band's characterization of the law in this area, a reservation boundary dispute is justiciable if a tribe presents the issue—Respondents' reading of *Rosebud* and *Yankton Sioux Tribe*—or if there is an actual enforcement action against a tribal member. Standing principles are not so one-sided, and this Court should grant certiorari to clarify that is the case.

CONCLUSION

Petition First National Bank of Milaca requests the Court grant its Petition for Certiorari to address this important question of federal law.

Respectfully submitted,

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